IN THE

Supreme Court of the United States

FALL TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA

Petitioner,

v.

WILLIE THOMAS BUTLER,
A/K/A "TOP CAT"

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases Cited

Federal

State

IN THE

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The Petitioner, State of North Carolina, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Carolina entered in this proceeding on June 6, 1978.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court granting *Butler* a new trial, Appendix A hereto, is reported at 295 N.C. 250, *244* S.E. 2d *410* (1978).

JURISDICTION

The decision of the Supreme Court of the State of North Carolina, Appendix A hereto, was filed on June 6, 1978, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Interpreting this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), after being fully advised of his rights and acknowledging an understanding of such rights, in the absence of a specific affirmative oral or written waiver of counsel by a suspect under arrest and being questioned, does federal law prohibit a state trial court from finding an *implied* waiver of counsel from the surrounding facts and circumstances of the case, under the Fifth Amendment, as applicable to the State through the Fourteenth Amendment, thereby prohibiting the use by the prosecution as evidence in a state court an incriminating statement by the criminal defendant made to an agent of the FBI when arrested in another state on a fugitive warrant after the defendant had been fully advised of his constitutional rights as required by *Miranda* and then had replied to such advising FBI Agent that he understood his rights, that he "didn't want to sign anything" and that he would "talk to you but I am not signing any form", when defendant thereafter spoke freely and voluntarily in answering the agent's questions without ever requesting the presence of counsel?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V which provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. GENERAL BACKGROUND

Willie Thomas Butler was convicted upon trial by jury in Wayne County Superior Court, North Carolina for the offenses of Kidnapping [N.C. Gen. Stat. §14-39], Armed Robbery [N.C. Gen. Stat. §14-87], and Felonious Assault [N.C. Gen. Stat. §14-32(a)]. From a judgment imposing two concurrent life sentences and a five year sentence of imprisonment which also ran concurrently, the defendant appealed to the North Carolina Supreme Court. That Court reversed such convictions and ordered a new trial finding defendant's confession, which was admitted into evidence against him, did not comply with the North Carolina Supreme Court's interpretation of *Miranda* v. *Arizona, supra.*

B. FACTS MATERIAL TO THE QUESTION PRESENTED

The State's evidence tended to show that Ralph Burlingame was closing a Kayo service station about 11:00 p.m. on 28 December 1976 in Wayne County, North Carolina, when two black males came to the door to buy beer. The two left upon being informed that the station had closed. Burlingame thereafter locked up and started to his car, but was accosted by the same two

males with pistols drawn. He was forced into his vehicle and ordered to drive away at gunpoint. He was informed that "it was a holdup" and that he would be killed at the end of the ride because he was white. Upon hearing this, Burlingame opened the door and jumped from the moving vehicle. As he fled, he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" when the assailants stopped the car and returned to take $30.00 from his wallet and to shoot him twice more. The police found Burlingame lying in the road shortly afterwards. Two bullets, each of a different caliber, were removed from his body at the hospital. He survived, but remained paralyzed. He identified defendant's photograph along with that of the accomplice in a twelve-photograph display a short time later. In court he was positive that the defendant was the man who shot him (R. pp. 48-69).

After these offenses, defendant fled the state and on May 2, 1977 he was arrested in New York as a fugitive by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings by Agent Martinez at the time of his arrest and again back at the Agent's office, where Butler was asked to execute an "Advice of Rights Form". After reading the form he acknowledged that he understood what it said but he indicated that he didn't want to sign the form and he didn't want to sign anything. In response to the Agent's subsequent question of whether or not he would be willing to talk to them, defendant stated: "I will talk to you but I am not signing any form." Defendant thereafter made no express statement that he did not want a lawyer present, but he never requested a lawyer either (R.pp. 6-19). His subsequent incriminating statement to the FBI Agents was held admissible by the trial judge who found that such statement was freely and voluntarily made after a proper *Miranda* warning and the defendant had "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions," since he had

read the rights form together with the waiver of rights, acknowledged his understanding of it, and chose to speak thereafter. This was assigned as error and it was this assigned error for which the North Carolina Supreme Court reversed defendant's convictions, ordering a new trial. The North Carolina Supreme Court interprets *Miranda* v. *Arizona, supra,* as requiring either an express written or an express oral waiver of counsel. Citing its own prior opinions, *State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971) and *State* v. *Siler,* 292 N.C. 543, 234 S.E. 2d 733 (1977) the Court held that a correct interpretation of *Miranda* requires that "waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." Thus, inclusion of defendant's incriminating statement in which he admitted drinking with a black male named Elmer Lee on 28 December 1976, agreeing with Lee to rob the Kayo gas station, accompanying Lee, who was armed, to the station, and participating in the robbery at the time Burlingame was shot, was prejudicial error requiring a new trial the Court held. (See Appendix A attached hereto.)

C. MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

The federal question presented herein was originally raised by *Butler,* by his timely objection at trial to the admission of any statement which he made to FBI Agent Martinez at the time of his arrest and his interrogation. Upon such timely objection, the trial court heard evidence on voir dire out of the presence of the jury and thereafter made the following findings of fact and conclusions of law:

> ". . . the Court makes the following findings of fact:

That on or about May 3, 1977 Agent Martinez together with other agents went to a fifth floor apartment building in the Bronx, New York, and knocked on a door and gained entrance to the apartment; that the defendant, Butler, was present in the apartment and was placed under arrest at that time for unlawful flight to avoid prosecution, the agent having information at that time that the defendant had allegedly committed an offense of armed robbery in the State of North Carolina; that the defendant was advised of his rights orally at the time of the initial arrest in New York City, and was advised that he had the right to remain silent; that anything he said could be used against him in court, and that he had the right to talk to a lawyer for advice before any questions were asked but if he could not afford an attorney that one would be appointed for him before any questioning; that if he decided to answer questions without a lawyer present that he could stop at any time and would have the right to have an attorney appointed for him at that time.

Having been warned of his rights as required by the *Miranda* decision, the defendant made no statements nor was he asked any questions at the time of the initial arrest of the defendant; that the defendant was subsequently transported by Agent Martinez to the New Rochelle, New York office of the FBI where the defendant was taken to an interrogation room where he was presented with State's Exhibit 1 on Voir Dire, the paper writing entitled 'Your Rights'; that it had been previously determined by Agent Martinez that the defendant had an eleventh grade education and that he could read and write; that State's Exhibit Number 1 on Voir Dire indicates the rights as shown thereon as follows:

> 'Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in Court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning; if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.'

The form also provides in the middle thereof the designation 'Waiver of Rights'. The Waiver reads:

> 'I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'

Having presented this form entitled 'Advice of Rights', and subdivision 'Your Rights' and 'Waiver of Rights', the defendant proceeded to read the form and upon conclusion of his reading the form indicated that he did not desire to sign the form but that he would make a statement to the agent which he proceeded to do as appears of record.

Based upon the foregoing, the court is of the opinion and concludes that the statement made by the

defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his rights; that he effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights; that the statement made by William Thomas Butler following the agent's advising him of his rights was voluntarily made at a time when the defendant understood his rights and that no promises or offers of leniency nor threats or pressure or coercion of any type has been exerted against the defendant, and that any statement or confession so made was freely and voluntarily given;

Based upon the foregoing, the court is of the opinion and rules as a matter of law that any statement made by William Thomas Butler in the presence of Agent David C. Martinez, after having been advised of his rights may be received in evidence in the trial of this action.

EXCEPTION No. 1"

(R.pp. 19-22)

The defendant's exception to such ruling was appealed from his conviction to the North Carolina Supreme Court asserting as error the admission of his confession in violation of his Federal constitutional rights. The North Carolina Supreme Court found the admission of such confession error and reversed, holding that

federal law (*Miranda* v. *Arizona*) requires the prosecution to show that an express oral or written waiver of right to counsel was specifically made by a defendant before his incriminating statement can be used as evidence against him and that no waiver can be implied in the absence of such express specific waiver.

The Federal Question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner in conflict with the applicable decisions of this Court.

In establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow," this Court's *Miranda* decision dictated that:

> "Prior to any questioning, the preson must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." [384 U.S. at 444 and 445] (Emphasis added)

The Court goes on further to say:

"Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 373] (Emphasis added)

The Court concludes:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . .

. . . .

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [384 U.S. at 478]

This Court in its *Miranda* decision clearly indicates that once a suspect is fully appraised of his Constitutional rights and acknowledges an understanding of such rights, then the police officer, in the proper performance of his duty, may elicit voluntary statements from the suspect, unless "the individual indicates in any manner" that he wishes to remain silent or that he wishes to speak with counsel. This Court has never interpreted the Fifth and Fourteenth Amendments to require a prosecutor to show a specific affirmative oral or written waiver of the right to counsel before an incriminating statement voluntarily made by the fully warned suspect could be used as evidence against him. Neither the *Miranda* decision nor any other decision of this Court has ever imposed such a requirement on prosecutors and law enforcement agencies attempting to carry out their proper functions within the guidelines of federal law.

In *Brewer* v. *Williams*, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S. Ct. 1232 (1977) this Court did not extend the principles of *Miranda* to the extent that the North Carolina Supreme Court has by its pronouncements in this case. In *Williams* this Court found that there was no evidence to support a waiver, emphasizing that *Williams* had in fact consulted with counsel and indicated he was not desirous of giving any information in the absence of his attorney. Under the principles of *Miranda*, ["If the individual indicates in any manner, . . ."] the confession in *Williams* had to be suppressed. However, this Court did not take the opportunity to establish a rule which would preclude the finding of an implied waiver in appropriate cases.

In *State of Oregon* v. *Hass*, 420 U.S. 714, 43 L.Ed. 2d 570, 95 S. Ct. 1215 (1975) this Court indicated that "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [420 U.S. at 719]

This Court has specifically refrained from imposing the restrictions under federal law which the North Carolina Supreme Court has seen fit to impose. Thus the decision of the North Carolina Supreme Court in this case is in direct conflict with that of this Court.

In order to guide the minds and actions of judges, prosecutors and law enforcement officers caught in this conflict and in order to insure that the federal law of the land is equally applied no more or less harshly or evenly in any one state as opposed to another, the conflict merits resolution by this Court.

B. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner contrary to that of the Federal Circuit Courts and that of the Supreme Courts and Courts of Appeal of other states.

The federal circuit courts have consistently interpreted *Miranda's* provisions regarding waiver indicating that to constitute waiver of the right to remain silent or right to counsel at custodial interrogation, an express statement that the accused does not want a lawyer or that he waives his right to remain silent is not required; what the prosecution must show is that the accused was effectively advised of his rights and that he voluntarily, intelligently and understandingly declined to exercise them by word or by conduct, viewing the totality of the circumstances. The following Circuits properly recognize the doctrine of implied waiver by interpreting federal law as requiring no mandatory showing of a specific express affirmative oral or written waiver of counsel by the defendant in order to introduce his statement into evidence: First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Federal Circuit Courts of Appeal.

Blackmon v. *Blackledge*, 541 F.2d 1070 (4th Cir. 1976) emphasizes the conflict between the North Carolina Supreme Court's interpretation of *Miranda* and the federal circuit court of this jurisdiction. Defendant Johnny James Blackmon was convicted during the March 29, 1971 Term of the Superior Court of Stanly County, North Carolina for the offense of first degree murder. The jury making no recommendation for life imprisonment, the death penalty was imposed and defendant appealed. One of the errors assigned on appeal was admission into evidence of defendant's confession. The trial court on *voir dire* had found that the defendant at the time of his arrest was fully warned of his constitutional rights under *Miranda*, that defendant "did not request . . . the presence of an attorney," that he stated "he understood his rights," and that incriminating statements made thereafter were admissible. The North Carolina Supreme Court ruled it was error for the trial judge to allow into evidence such statement because there was no showing as required by federal law, as that court interpreted *Miranda*, that the defendant had made a specific affirmative oral or written

waiver of counsel, rendering the inclusion of such evidence prejudicial error. [*State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971)] On retrial the defendant was again convicted during the 28 August 1972 session of Superior Court in Union County, North Carolina. The confession was again offered and received into evidence. The *voir dire* testimony showed that the incriminating statements which defendant made were made in an interrogation room in the presence of police officers when defendant was confronted by a co-defendant who accused the defendant of having shot the victim. The incriminating statements resulting from the exchange between these two suspects were admitted into evidence against Blackmon. When the co-defendant had left the room and the Sheriff asked defendant, "Do you care to make any further statement?", defendant responded, "Well, I'm just going to tell you how it was." His subsequent incriminating narrative was also admitted into evidence. On this second appeal the North Carolina Supreme Court in reviewing this same confession again said, "[t]hese facts, however, are not sufficient to constitute a waiver of counsel. *There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of Miranda on which our decision* in *State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), *is based.*" [*State* v. *Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431, 437 (1973) (Emphasis added)] However, the court thereafter held the evidence admissible on the theory that such statements were not the result of an interrogation and were more in the nature of volunteered information. [*State* v. *Blackmon*, 284 N.C. at 12] The conviction was affirmed and case remanded for imposition of a life sentence. Blackmon thereafter proceeded by writ of habeas corpus to the Federal District Court for the Western District of North Carolina challenging his conviction through the use of such confession in violation of his federal constitutional rights. The District Court granted the writ, [*Blackmon* v. *Blackledge*, 396 F.Supp. 296 (W.D.N.C. 1975)],

but the Circuit Court of Appeals reversed, finding under the facts as previously described that there had been a compliance with *Miranda* and that Blackmon had waived counsel, stating that after proper warnings ". . . a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel. . ." [541 F.2d at 1072].

These opinions clearly focus the conflict in interpretation of federal law that exists in this jurisdiction and which requires immediate resolution.

In *United States* v. *Montos*, 421 F.2d 215 (5th Cir. 1970) the court faced the question of the admissibility of defendant postal employee's confession to mail theft made to a federal postal inspector after proper *Miranda* warnings had been given, but defendant had made no specific verbal or written waiver of counsel. In finding no error by the admission of such evidence the court stated, "An express statement that the individual does not want a lawyer is not required, however, to show that the individual waived his right to have one present. *See Bond* v. *United States*, 397 F.2d 162, 165 (10th Cir. 1968). All the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them. *See Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L.Ed. 2d 70 (1962)." [421 F. 2d at 224]. Thus the court's premise of implied waiver is based on its interpretation of federal law as explained in *Carnley* v. *Cochran, supra*, decided by this court in 1962 and which continues to give guidance in this area of federal law.

The facts of other federal cases in the remaining circuits recognizing this implied waiver concept are similar to those set out in *Montos, supra* where a defendant, after proper warnings and an acknowledgment of an understanding of such rights, begins to speak without first making a specific express oral or written waiver of counsel.

See:

U.S. v. *Speaks*, 453 F.2d 966 (1st Cir. 1971);
U.S. v. *Boston*, 508 F.2d 1171 (2nd Cir. 1974);
U.S. v. *Studkey*, 441 F.2d 1104 (3rd Cir.), cert. denied 404 U.S. 841 (1971);
U.S. v. *Ruth*, 394 F.2d 134 (3rd Cir.) cert. denied 393 U.S. 888 (1968);
U.S. v. *Thompson*, 417 F. 2d 196 (4th Cir.) cert. denied, 396 U.S. 1047 (1970);
U.S. v. *Cavallino*, 498 F.2d 1200 (5th Cir. 1972);
U.S. v. *Montos*, 421 F.2d 215 (5th Cir.) cert. denied 397 U.S. 1022 (1970);
U.S. v. *Ganter*, 436 F.2d 364 (7th Cir. 1970);
Hughes v. *Swenson*, 452 F.2d 866 (8th Cir. 1971);
U.S. v. *Marchildon*, 519 F.2d 337 (8th Cir. 1975);
U.S. v. *Moreno-Lopez*, 466 F.2d 1205 (9th Cir. 1972);
U.S. v. *Hilliken*, 436 F.2d 101 (9th Cir. 1970);
Bond v. *U.S.*, 397 F.2d 162 (10th Cir.), cert. denied 393 U.S. 1035 (1969);
U.S. v. *Cooper*, 499 F.2d 1060 (D.C. Cir. 1974);
U.S. v. *McNeil*, 433 F.2d 1109 (D.C. Cir. 1974); and
Mitchell v. *U.S.*, 434 F.2d 483 (D.C. Cir.), cert. denied 400 U.S. 867 (1970).

From the foregoing it appears that the interpretation of the North Carolina Supreme Court of federal law is in complete conflict with all of the U.S. Circuit Courts of Appeal which have decided this issue, which is all such circuits except one. This clear and fundamental conflict requires immediate resolution.

An examination of the opinions of the Supreme Courts and Courts of Appeal of the various States within this United States interpreting this fundamental federal concept of law reveals that the issue of implied waiver of counsel during interrogation, presented in differing ways, has been addressed by the courts in a substantial number of states. In numerous opinions these courts have recognized from similar fact situations that federal constitutional law mandates no requirement that a properly

warned defendant, who acknowledges an understanding of such rights, specifically express either an oral or written waiver of counsel in order for the court to find a waiver implied from the totality of the circumstances surrounding the making of such statement.

The recent opinion of the Supreme Court of Georgia in *Peek* v. *State*, 239 Ga. 422, 238 S.E. 2d 12 (1977) is indicative of these state court decisions. Peek was convicted of two counts of murder and one of kidnapping. On appeal he assigned as error the admission of his confession to a sheriff who testified that defendant was informed of his constitutional rights before he made incriminating statements. The Georgia Supreme Court's interpretation of this federal question was explained as follows:

> "Although *Miranda* establishes that the accused has a constitutional right to the presence of an attorney during an in-custody interrogation, that right has been found to have been waived where the accused is informed of his rights, understands them, and then proceeds voluntarily to answer questions in the absence of counsel. See e.g., *Blackmon* v. *Blackledge*, 541 F.2d 1070 (4th Cir. 1976); *United States* v. *James*, 528 F.2d 999, 1019 (5th Cir. 1976); *United States* v. *Marchildon*, 519 F.2d 337 (8th Cir. 1975); *United States* v. *Boston*, 508 F.2d 1171 (2nd Cir. 1974) We do not construe the decision of the United States Supreme Court in *Brewer* v. *Williams*, 430 U.S. 387, as overruling the previously cited federal appellate court decisions." [238 S.E. 2d at 16]

For additional state cases recognizing the concept of implied waiver, see:

ALABAMA—*Sullivan* v. *State*, Ala. Cr. App. 351 So. 2d 659, cert. denied 351 So. 2d 665 (1977)

ARIZONA—*State* v. *Pineda*, 110 Ariz. 342, 519 P. 2d 41 (1974); *State ex rel Berger* v. *Superior Court*, 109 Ariz. 506, 513 P. 2d 935 (1973).

CALIFORNIA—*People* v. *Johnson*, 75 Cal. Rptr. 401, 450 P.2d 865 (reversed on other grounds) (1969). *People* v. *Sam*, 77 Cal. Rptr. 804, 454 P.2d 700 (1969)

COLORADO—*People* v. *Weaver*, 179 Colo. 331, 500 P.2d 980 (1972);
Reed v. *People*, 171 Colo. 421, 467 P. 2d 809 (1970).

DELAWARE—*Aaron* v. *State*, Del. Supr. 275 A. 2d 791 (1971)

FLORIDA—*State* v. *Craig*, Fla. 237 So. 2d 737 (1970)

GEORGIA—*Peek* v. *State*, 239 Ga. 422, 238 S.E. 2d 12 (1977).

ILLINOIS—*People* v. *Brooks*, 51 Ill. 2d 156, 281 N.E. 2d 326 (1972).

MAINE—*State* v. *Hazelton*, Me. 330 A. 2d 919 (1975)

MARYLAND—*Miller* v. *State*, 251 Md. 362, 247 A. 2d 530 (1968).
Burton v. *State*, 7 Md. App. 671, 256 A. 2d 826 (1969).

MASSACHUSETTS—*Commonwealth* v. *Johnson*, Mass. App. 326 N.E. 2d 355 (1975).
Commonwealth v. *Murray*, 359 Mass. 541, 269 N.E. 2d 641 (1971).

MINNESOTA—*State* v. *Nelson*, ____ Minn. ____, 257 N.W. 2d 356 (1977).

MISSOURI—*State* v. *Williams*, Mo. Cr. App. 547 S.W. 2d 139 (1977).
State v. *Alewine*, Mo. 474 S.W. 2d 848 (1972)
State v. *Burnside*, Mo. 473 S.W. 2d 697 (1971)

OKLAHOMA—*Shirley* v. *State*, Okl. Cr. 520 P. 2d 701 (1974)

OREGON—*State* v. *Davidson*, 252 Ore. 617, 451 P. 2d 481 (1969)

PENNSYLVANIA—*Commonwealth* v. *Cost*, 238 Pa. Superior Ct. 591, 362 A. 2d 1027 (1976).
Commonwealth v. *Garnett*, 458 Pa. 4, 326 A. 2d 335 (1974).

TENNESSEE—*Parks* v. *State*, Tenn. Cr. App. 543 S.W. 2d 855 (1976).
Bowling v. *State*, Tenn. Cr. App. 458 S.W. 2d 639 (1970).

VIRGINIA—*Land* v. *Commonwealth*, 211 Va. 223, 176 S.E. 2d 586 (1970) (reversed on other grounds).

WASHINGTON—*State* v. *Young*, 89 Wash. 2d 613, 574 P. 2d 1171 (1978).

These State court opinions from courts which had addressed this issue clearly are in conflict with that of the North Carolina Supreme Court in the interpretation of federal constitutional rights which will be applied to defendants being tried in the various state courts and which will govern the admissibility of evidence in such courts. This fundamental conflict between the North Carolina Supreme Court and the appellate courts of its various sister states requires immediate resolution.

CONCLUSION

The decision of the North Carolina Supreme Court with respect to the use of evidence in the prosecution's case-in-chief in a North Carolina criminal state court proceeding under an interpretation solely of federal law is in complete conflict with the decisions of this Court, with the decisions of all the federal circuit courts of appeal which have ruled on the issue, and with a

substantial number of state appellate courts. Such conflicting interpretation of federal law results in the uneven and unequal application of fundamental federal constitutional rights among the various state courts. In order to guide the minds and actions of judges, prosecutors, and law enforcement officers caught in this conflict, in order to insure that a State "not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them" [*Oregon* v. *Hass*, *supra*, 420 U.S. at 719], and to insure the equal interpretation and application of this important and fundamental issue of federal law in the various state and federal courts, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of North Carolina herein.

Respectfully submitted,

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APPENDIX A

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1978

No. 87 — Wayne

STATE OF NORTH CAROLINA

v.

WILLIE THOMAS BUTLER,
a/k/a TOP CAP

Defendant appeals from judgment of Grist, J., 31 October 1977 Session, Wayne Superior Court.

Defendant was tried on separate bills of indictment charging (1) felonious assault, (2) kidnapping and (3) armed robbery, the State alleging that all three crimes were committed on 28 December 1976 in Wayne County.

The State's evidence tends to show that Ralph Burlingame was closing a Kayo station about 11 p.m. on 28 December 1976 when two black males came to the door to buy beer. They left when told that the station was closed. Burlingame completed his inventory for the day, locked up and started to his car parked nearby. The same two black males with pistols drawn then accosted Burlingame and forced him to drive them away in his own car. Defendant told Burlingame "it was a holdup" and he was going to kill him when the ride ended because he was a white boy. In a few seconds Burlingame opened the door and jumped from the

moving car. As he jumped he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" as he lay in the street while the robbers stopped the car 200 feet away, returned, took his wallet containing $30, shot him twice more and ran away. Shortly thereafter police officers arrived and took him to the hospital.

Within a week Burlingame positively identified photographs of defendant Butler and Elmer Lee from a twelve-photograph display. He testified in court that he was certain defendant was the man who shot him.

Defendant fled the State and was arrested in New York City on 3 May 1977 by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings, refused to sign a waiver of rights but said he understood his rights and would talk with the arresting officers. He made an incriminating statement which was admitted into evidence over objection. Defendant contended at trial, and now contends, that he never waived counsel at the in-custody interrogation by Martinez.

Defendant testified as a witness in his own behalf. He denied that he was a participant in the robbery of Ralph Burlingame and denied ever having seen Burlingame prior to a pretrial hearing held three weeks before his trial. He further denied making an admission to FBI Agent Martinez and denied that he waived any of his rights. He stated he did not know Elmer Lee and was not with him on the night of 28 December 1976 when the kidnapping and armed robbery allegedly occurred.

Defendant was convicted as charged in all three cases and given a life sentence for kidnapping, a life sentence for armed robbery and five years for the felonious assault, all sentences to run concurrently. He appealed the kidnapping and armed

robbery cases to the Supreme Court, and we allowed motion to bypass the Court of Appeals in the felonious assault case to the end that all three convictions receive initial appellate review in this Court. Defendant assigns errors discussed in the opinion.

RUFUS L. EDMISTEN, Attorney General, by THOMAS F. MOFFITT, Associate Attorney, for the State of North Carolina

MICHAEL A. ELLIS and R. GENE BRASWELL, attorneys for defendant appellant

HUSKINS, Justice:

Defendant assigns as error the admission of his inculpatory statement to FBI Agent David C. Martinez, made while in custody and without benefit of counsel. He contends the incriminating statement is inadmissible because he had not waived his constitutional right to the presence and assistance of counsel, relying on *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), as interpreted and applied by this Court in *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). This constitutes his first assignment of error and requires examination of the proceedings on voir dire and the findings of the court based thereon.

FBI Agent Martinez testified on voir dire that he arrested defendant at 1225 Sheraton Avenue in Brooklyn, New York, on a fugitive warrant on 3 May 1977. He was immediately and fully advised of his constitutional rights and transported to the New Rochelle office where he was again advised of his rights. Defendant, who had an eleventh grade education, then took the "Advice of Rights" form and read it himself. He was asked if he understood his rights and he replied that he did. As to signing the "Waiver of Rights" printed at the bottom of the

form. defendant said "he didn't want to sign this form and that he didn't want to sign anything." He was told that it was not mandatory that he talk and that he didn't have to sign the form but that "we would like for him to talk to us." Defendant replied: "I will talk to you but I am not signing any form." FBI Agent Martinez then made a notation on the form that defendant refused to sign it.

Since Defendant had stated he would talk to Officer Martinez. he was then asked "if he had participated in the armed robbery and he stated that he was there but that he did not actually participate as such in the armed robbery. We asked him to explain a little further and he stated that he and an accomplice had been drinking heavily that day and were walking around and decided to rob a gas station. They came up to a gas station where the attendant was locking up for the night and walked inside the station. He stated that the fellow with him pulled out a gun and told the gas station attendant to get in his car. He then said that the gas station attendant tried to run away and that his friend shot the attendant. At this point Mr. Butler stated that he ran away from them and didn't look back. He stated that he ran to a bus station where he caught a bus to Virginia and that in Virginia he caught another bus to New York where he had been until he was apprehended that morning. We asked him if the other person was someone by the name of Elmer Lee and we had had communications from our Charlotte office saying that Elmer Lee had also been involved. Butler said that Lee was there."

On cross-examination Agent Martinez said: "He did not say anything when I advised him of his right to have an attorney and he just sat there and listened. I repeatedly asked him if he understood his rights and he said that he did. He stated that he would not sign the paper...."

Upon further interrogation by the presiding judge, Agent Martinez said: "He never told us that he did not want the lawyer present. He never told us he did want a lawyer present.... He said 'I won't sign the form. I will talk to you but I won't sign the form.'... What made me believe that he did not want a lawyer present at that time was the fact that he was relating the story concerning the charges against him at that point. If he had wanted an attorney present with him, he wouldn't have said anything."

Based upon the evidence of Agent Martinez — defendant offered none on voir dire — the court found, among other things, that defendant's statement to Agent Martinez was made freely and voluntarily after having been advised of his rights as required by *Miranda,* including his right to an attorney, and that defendant understood his rights and "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the waiver of rights; that the statement... was voluntarily made at a time when the defendant understood his rights...." Upon those findings the court concluded as a matter of law that defendant had knowingly waived his right to counsel and that his statement was competent evidence in the trial of the action. Defendant's first exception and assignment of error is based on this ruling. We hold that the assignment is sound and must be sustained.

Admission of defendant's inculpatory statement to Agent Martinez was erroneous because the evidence on voir dire is insufficient to support the finding that defendant waived his right to counsel. He refused to waive it in writing and the evidence on voir dire fails to show a specific oral waiver knowingly made.

In *Miranda* v. *Arizona*, supra, the United States Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given.... [Emphasis added.]
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> * * * *
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained....
>
> * * * *
>
> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

384 U.S. at 470, 475, 479, 16 L.Ed.2d at 721, 724, 726, 86 S.Ct. at 1626, 1628, 1630.

In *Carnley* v. *Cochran*, 369 U.S. 506, 516, 8 L.Ed.2d 70, 77, 82 S.Ct. 884, 890 (1962), the United States Supreme Court said:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Measured by *Miranda* standards it is apparent that the findings of fact are not supported by the voir dire testimony of Agent Martinez. Failure to request counsel is not synonymous with waiver. Nor is silence. *Compare State* v. *Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977). The trial judge erred in holding that since defendant had been fully informed and understood his right to the presence of counsel at the in-custody interrogation and did not request a lawyer, his act in making the statement amounted to a waiver of counsel. The holding in *Miranda* as interpreted and applied by this Court in *Blackmon* provides in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is "specifically made" after the *Miranda* warnings have been given.

Although there is other evidence amply sufficient to support a conviction in this case, the statement made by defendant to Agent Martinez placed him at the scene of the crime in company with Elmer Lee with whom defendant had agreed to rob a gas station and describes the attempted robbery. This statement alone would have been sufficient to convict defendant of armed robbery at least. There is a reasonable possibility that defendant's statement might have contributed to his conviction. Therefore, we cannot say beyond a reasonable doubt that the inculpatory statement did

not materially affect the result of the trial to defendant's prejudice or that it was harmless error. *See Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963); *State* v. *Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972); *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). The State argues for harmless error, relying on *State* v. *Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972), *cert. den.* 414 U.S. 1160 (1974), but that case is factually distinguishable. Error in the admission of defendant's incriminating statement to Agent Martinez requires a new trial.

Defendant's remaining assignment alleging error in allowing the district attorney to ask leading questions is without merit and requires no discussion.

For the reasons stated defendant is entitled to a new trial in each case and it is so ordered.

NEW TRIAL.

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

/s/ Mrs. Peggy N. Byrd
DEPUTY CLERK
23 August 1978

CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA by depositing copies of same in the United States Mail at Raleigh, North Carolina, first class postage paid, addressed to:

Mr. R. Gene Braswell
Attorney at Law
231 E. Walnut Street
Goldsboro, North Carolina 27530

Mr. Michael A. Ellis
Attorney at Law
615 Park Avenue
Goldsboro, North Carolina 27530

This 30th day of August, 1978.

/s/ _____
DONALD W. STEPHENS
Assistant Attorney General

COUNSEL FOR THE STATE OF
NORTH CAROLINA, PETITIONER